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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC ANTHONY EATON,

Defendant and Appellant.

C085625

(Super. Ct. No. 62143763,
62130864A)

In April 2016, in Placer County case No. 62-130864A, a jury found defendant Eric Anthony Eaton guilty of four counts of burglary of a vehicle (counts one, four, six, and nine—Pen. Code, § 459); four counts of damaging or taking part of a vehicle, misdemeanors, (counts two, five, seven, and ten); three counts of receiving stolen property, misdemeanors, (counts three, eight, and eleven); one count of evading an officer while driving with willful or wanton disregard for safety (count fourteen—Veh.

Code, § 2800.2); and one count of unlawful driving or taking of a vehicle (count fifteen; Veh. Code, § 10851).¹

In May 2017, in Placer County case No. 62-143763, a jury found defendant guilty of one count of assault by means of force likely to produce great bodily injury and one count of battery, a misdemeanor. The jury was unable to reach a verdict as to the allegation that defendant personally inflicted great bodily injury as to count one, and the court declared a mistrial as to that enhancement.

In a bifurcated proceeding, defendant admitted two prior strikes, two prison priors, and two prior serious felony convictions.

The court sentenced defendant to a total term of 18 years in prison for both cases.

On appeal, defendant raises various arguments regarding his 2016 convictions: (1) the evidence was insufficient to support his convictions for evading an officer while driving with willful or wanton disregard for safety (count fourteen) and burglary of a Chevy truck (count six); (2) the trial court erred by failing to instruct the jury on misdemeanor evading as a lesser included offense of felony evading; and (3) his conviction for felony unlawful driving or taking of a vehicle (count fifteen) must be reduced to a misdemeanor under Proposition 47 (the “Safe Neighborhoods and Schools Act”).

We will conditionally reverse defendant’s conviction for unlawful driving or taking a vehicle, vacate the sentence, and remand for retrial on that count on the election of the People and resentencing. In all other respects, we will affirm defendant’s convictions.

¹ The jury was unable to reach a verdict on one count of assault with a firearm on a peace officer (count twelve) and one count of shooting at an occupied motor vehicle (count thirteen), and the trial court declared a mistrial as to those counts.

I. BACKGROUND

We summarize only those facts relevant to the arguments and convictions at issue in this appeal.

The owner of a Volkswagen testified that he reported his car stolen on December 17, 2013. It was parked, unlocked outside of a church in Foresthill with the keys inside. He saw it being driven the following day, and two men were in the car.

On the morning of December 19, 2013, the owner of the Foresthill Garage found that several vehicles on his property had been broken into, including a 1979 Chevy truck. The Chevy had been locked, and the sliding glass window on the back was found open. The stereo had been removed and the ignition was damaged. The sheriff's deputy who arrived at the garage testified that a screwdriver fell out of the truck when she opened one of the doors. It looked like someone "tried to jam something into the ignition or punch it," possibly a screwdriver or other sharp object. The deputy opined that the truck had been broken into through the back window. The owner of the truck also testified that she believed the truck was broken into by someone climbing through the back. The back window did not have a locking latch, and the owner was capable of fitting through the window herself.

The owner of the garage provided surveillance video from the previous night that showed a light coming on in the truck, two suspects, and a Volkswagen car. Codefendant identified himself and defendant as being the two people in the surveillance video.

On December 22, 2013, a sheriff's deputy working the graveyard shift drove by a gas station in Auburn and saw a car parked between two trucks with its headlights on. When the deputy returned later with a ride-along, she pulled face-to-face with the car, which was now pulled in front of the trucks and had its headlights off. It was a Volkswagen with two people inside. Defendant was in the driver's seat and codefendant was his passenger. The defendants made eye contact with the deputy before speeding off with the car's headlights still off. After the deputy turned on her emergency light and

siren, the car crossed the Foresthill Bridge, where the speed limit was reduced from 55 miles per hour to 35 miles per hour because of construction. Defendant was driving over 90 miles per hour.

After crossing the bridge, defendant turned on the car's headlights and continued on Foresthill Road for about 20 miles toward the town of Foresthill. Foresthill Road is a dark, windy, mountain road that runs alongside a canyon. The road is one lane in each direction except for an occasional passing lane. The Volkswagen crossed over double yellow lines and into the oncoming lane of traffic multiple times. The car used most of the roadway. It was traveling over 100 miles per hour at some points. As defendant approached the town of Foresthill, there were several vehicles in the oncoming lane and two vehicles in his lane. The Volkswagen swerved and "almost took a truck off the road." The speed limit decreases from 55 miles per hour to 35 miles per hour near town, and then to 25 miles per hour through town. Defendant did not decrease his speed, but the deputy did and started to lose sight of the Volkswagen. A short time later, the Volkswagen crashed into a telephone pole.

Codefendant testified that defendant was driving more than 100 miles per hour after they crossed the Foresthill Bridge. Codefendant was scared for his life because they "were in a car that was traveling that fast on a road with other vehicles with a cop behind [them]." Defendant told his codefendant, "[w]e are running away, the car is stolen." The car was traveling more than 60 miles per hour when it hit the telephone pole.

During a visit with a family member while he was in jail, defendant said he " 'hit the pole on purpose.' "

II. DISCUSSION

A. *Evasion of a Pursuing Peace Officer*

Defendant raises two challenges to his conviction for evasion of a pursuing peace officer in violation of Vehicle Code section 2800.2, subdivision (a). Vehicle Code section 2800.1, set out in full at footnote 2, *post*, makes it a misdemeanor to attempt to

evade a pursuing peace officer.² Vehicle Code section 2800.2, subdivision (a) elevates the offense of evasion of a peace officer to a felony where the defendant attempts to evade the officer by driving a vehicle “in a willful or wanton disregard for the safety of persons or property.”³

1. Substantial Evidence

Defendant contends his conviction for violating Vehicle Code section 2800.2, subdivision (a) is not supported by substantial evidence. Specifically, defendant suggests he only passed one other vehicle, and that vehicle was not in any way endangered by his driving. This claim is without merit.

“In reviewing the sufficiency of the evidence, we must determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] ‘[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence

² Subdivision (a) of Vehicle Code section 2800.1, provides: “Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer’s motor vehicle, is guilty of a misdemeanor punishable by imprisonment in a county jail for not more than one year if all of the following conditions exist: [¶] (1) The peace officer’s motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer’s motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer’s motor vehicle is distinctively marked. [¶] (4) The peace officer’s motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform.”

³ “For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under [Vehicle Code s]ection 12810 occur, or damage to property occurs.” (Veh. Code, § 2800.2, subd. (b).) The jury was not instructed on this point.

which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. Davis* (1995) 10 Cal.4th 463, 509.)

Defendant’s argument is not based on an accurate depiction of the record. The sheriff’s deputy testified that they encountered multiple vehicles as they approached the town of Foresthill, and that, at this point, the Volkswagen swerved and “almost took a truck off the road.” Codefendant testified he was scared for his life because they “were in a car that was traveling that fast on a road *with other vehicles* with a cop behind [them].” (Italics added.) Further, defendant drove more than 100 miles per hour at some points. He crossed over into the oncoming lane of traffic multiple times on a dark, windy, mountain road. Defendant intentionally drove into a telephone pole at more than 60 miles per hour. The jury’s conclusion that defendant drove “in a willful or wanton disregard for the safety of persons or property” was amply supported by the record.

2. *Misdemeanor Evasion of a Peace Officer*

Misdemeanor evading under Vehicle Code section 2800.1 is a lesser included offense of felony evading under Vehicle Code section 2800.2. (*People v. Springfield* (1993) 13 Cal.App.4th 1674, 1679-1680.) “The only distinction between the two crimes is that in committing the greater offense the defendant drives the pursued vehicle ‘in a willful or wanton disregard for the safety of persons or property.’ (Veh. Code, § 2800.2.)” (*Id.* at p. 1680.)

Defendant contends the trial court erred by failing to instruct the jury on misdemeanor evading as a lesser included offense of felony evading. We conclude there was no error.

“The trial court must instruct on general legal principles closely related to the case. This duty extends to necessarily included offenses when the evidence raises a question as to whether all the elements of the charged offense are present.” (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) Instructions on a lesser included offense “are required only

where there is ‘substantial evidence’ from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.” (*Ibid.*)

In *People v. Springfield*, *supra*, 13 Cal.App.4th 1674, upon which defendant relies, the court of appeal reversed a felony evading conviction because the trial court had failed to instruct the jury on the lesser included offense of misdemeanor evading. (*Id.* at p. 1681.) In that case, however, “there was conflicting evidence concerning the manner [the defendant] drove the pursued vehicle. While there was substantial evidence to support a finding, based on the officers’ testimony, that [the defendant] drove with a willful and wanton disregard for the safety of other persons and property, there was also evidence, based largely on [the defendant’s] testimony, that he did not drive in such a manner.” (*Id.* at pp. 1680-1681.)

Here, in contrast, there was no evidence defendant attempted to evade the peace officer without driving recklessly. Even his codefendant testified he was afraid for his life. Defendant drove at a high rate of speed on a windy mountain road while failing to remain on his side of the road. He eventually drove into a telephone pole while driving about twice the speed limit. Again, defendant’s contention that there was a lack of other vehicles on the road and no one was endangered by his driving is neither persuasive nor accurate. Where, as here, there was no evidence the offense was less than that charged, the trial court was not obligated to provide a lesser included instruction.

B. Vehicle Code Section 10851

Vehicle Code section 10851, subdivision (a) proscribes driving or taking a vehicle without the owner’s consent. It provides: “Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, . . . is guilty of a public offense . . .” (Veh. Code, § 10851, subd. (a).) A violation is a “wobbler” offense,

punishable as either a misdemeanor or a felony. (*People v. Jackson* (2018) 26 Cal.App.5th 371, 377.)

“As the Supreme Court has observed, [Vehicle Code] section 10851, subdivision (a), ‘proscribes a wide range of conduct.’” [Citation.] A person can violate [Vehicle Code] section 10851 by ‘[u]nlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession.’” (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 853-854 (*Gutierrez*).) This is a form of theft. (*People v. Page* (2017) 3 Cal.5th 1175, 1183 (*Page*).) Vehicle Code “[s]ection 10851 can also be violated ‘when the driving occurs or continues after the theft is complete’ (referred to by the Supreme Court as ‘posttheft driving’) or by ‘driving [a vehicle] with the intent only to temporarily deprive its owner of possession (i.e. joyriding).’”” (*Gutierrez, supra*, at p. 854.) These are not forms of theft. (*Page, supra*, at p. 1183.)

Enacted by the voters on November 4, 2014, and effective the next day, Proposition 47 reduced the punishment for certain drug and theft offenses by making them punishable as misdemeanors rather than felonies. (*Page, supra*, 3 Cal.5th at pp. 1179, 1181.) Proposition 47 amended or added several statutory provisions. (*Id.* at p. 1179.) Penal Code section 490.2, added by Proposition 47, provides that notwithstanding any other law defining a form of grand theft, the theft of property with a value not exceeding \$950 constitutes petty theft and is punished as a misdemeanor. In *Page*, our Supreme Court reasoned that Penal Code section 490.2 “covers the theft form of the Vehicle Code section 10851 offense. As noted, [Penal Code] section 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who ‘obtain[ed] any property by theft’ where the property is worth no more than \$950. An automobile is personal property. ‘As a result, after the passage of Proposition 47, an offender who obtains a car valued at less than \$950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.’” (*Page, supra*, at p. 1183.)

Defendant was charged with a felony violation of Vehicle Code section 10851 after the effective date of Proposition 47. The information alleged that “[o]n or about December 17, 2013[,] through December 22, 2013,” defendant unlawfully drove *and took* the Volkswagen without the owner’s consent and with the intent “either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.” No allegations were made regarding the dollar value of the car. The court similarly instructed the jury, pursuant to CALCRIM No. 1820, that to prove defendant was guilty of unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851, “the People must prove that, one, the defendant took or drove someone else’s vehicle without the [owner]’s consent; and, two, when the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time.” The court continued with bracketed language from CALCRIM No. 1820 that explained, “[a] taking requires that the vehicle be moved for any distance, no matter how small.”

Defendant contends his conviction must be reduced to a misdemeanor because there was no evidence presented that the Volkswagen was worth more than \$950. In support, he cites *People v. Love* (2008) 166 Cal.App.4th 1292, in which the defendant was convicted of a variety of felony grand theft offenses—none of which involved vehicles—under statutes that unambiguously required proof that the value of the stolen property exceeds \$400 to constitute grand theft. (*Id.* at pp. 1296-1297, 1300-1301.) Notably, in that case, the People conceded the defendant’s convictions “must be reduced to misdemeanors.” (*Id.* at p. 1300.) *Love* is unhelpful because it does not address the nuance presented here: “Although the record cannot support a guilty verdict for felony vehicle theft, the problem with [defendant]’s felony conviction is not the sufficiency of the evidence but jury instructions that failed to adequately distinguish among, and separately define the elements for, each of the ways in which [Vehicle Code] section 10851 can be violated.” (*Gutierrez, supra*, 20 Cal.App.5th at p. 856.) “This error was

eminently understandable since *Page* was not decided until . . . after [defendant]’s trial.” (*People v. Jackson, supra*, 26 Cal.App.5th at p. 378.)

“The court’s instructions here allowed the jury to convict [defendant] of a felony violation of [Vehicle Code] section 10851 for stealing the . . . car, even though no value was proved—a legally incorrect theory—or for a nontheft taking or driving offense—a legally correct one.” (*Gutierrez, supra*, 20 Cal.App.5th at p. 857.) “ ‘When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground.’ [Citation.] Unlike with other types of instructional error, prejudice is *presumed* with this type of error.” (*People v. Jackson, supra*, 26 Cal.App.5th at p. 378.) “This presumption of prejudice is rebutted only if the record permits the conclusion ‘beyond a reasonable doubt that the jury based its verdict on [a] legally valid theory.’ ” (*Id.* at pp. 378-379.)

The People argue that, based on the charging document, evidence presented, jury instructions, and closing argument, the jury must have found defendant guilty under an unlawful driving theory. We disagree. Again, the charging document and the jury instructions permitted the jury to find defendant guilty under a theft theory of the offense. The jury instructions even included additional information regarding what is required to establish a taking. The prosecutor’s closing argument did not sufficiently clarify the issue: “First element is that the defendant took or drove someone else’s vehicle without the owner’s consent. We know the vehicle . . . was reported stolen on December 17th. Well, the next day, that same vehicle . . . was at the Foresthill Garage. In fact, [codefendant] corroborated that, said they drove that vehicle—even though he claims he didn’t know it was stolen at the time, even though he hangs out in the location of where that vehicle was stolen from, he was observed driving that vehicle, he was observed as a passenger in that vehicle.” The prosecution’s discussion did not preclude a conviction based on theft. As the prosecutor noted, defendant was seen with the Volkswagen the

day after it was reported stolen while committing other crimes. This is a fact that helps establish sufficient evidence to support a conviction based on theft. (See *People v. Jackson*, *supra*, 26 Cal.App.5th at p. 380 [“While the evidence of driving may have been stronger than the evidence of taking, substantial evidence was introduced to support a conviction for stealing the [vehicle], based on [defendant]’s possession of it under suspicious circumstances shortly after it was stolen”].) We therefore cannot conclude beyond a reasonable doubt that the jury relied on a driving theory to convict defendant under Vehicle Code section 10851. “[T]he appropriate remedy is to remand for the People to elect whether to retry [defendant] on a felony charge or accept the conviction’s reduction to a misdemeanor. Therefore, . . . we will reverse the conviction, vacate the sentence, and remand for the People to make such an election.” (*People v. Jackson*, *supra*, at p. 381.)

C. *Burglary (Count Six)*

Defendant contends the evidence was insufficient to support his conviction under Penal Code section 459 with respect to count six because defendant entered that particular vehicle (the 1979 Chevy truck) through an unlocked window.

Penal Code section 459 provides, in pertinent part, as follows: “Every person who enters any . . . vehicle as defined by the Vehicle Code, when *the doors are locked*, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.” (Italics added.) Here, the doors of the Chevy were locked, but the rear window did not have a locking latch. In *People v. Malcolm* (1975) 47 Cal.App.3d 217 (*Malcolm*), this court addressed a similar situation and held that a violation of Penal Code section 459 was established where the doors of a vehicle were locked and the windows were closed, but one window lock was broken and the defendant opened the window and then reached his arm inside to open the door: “For all intents and purposes the car in question was locked. By mere happenstance, one window was faulty and could not be tightly

secured, thereby allowing the defendant to gain entrance into the car.” (*Malcolm, supra*, at p. 223.) The same can be said about defendant’s entry into the Chevy truck.

Defendant relies on two authorities that are inapposite. In *People v. Allen* (2001) 86 Cal.App.4th 909 (*Allen*), the locks on the door were broken, and thus the car could not be locked. (*Id.* at p. 912.) The defendant opened the trunk by pulling the latch under the driver’s seat. (*Ibid.*) In concluding that the defendant did not violate Penal Code section 459 when he entered the trunk,⁴ the appellate court explained, “[t]he fact that the [trunk] latch was designed to permit access to the trunk distinguishes this case from []*Malcolm, supra*, 47 Cal.App.3d 217. In *Malcolm*, the doors of the vehicle were locked and access was gained through a wind wing, an item not designed to enable access.” (*Allen, supra*, at p. 917, fn. 4.) Likewise, while it was possible for a person to enter the Chevy truck by climbing through a window, this would not be how the truck was designed to be entered. The court in *Allen* also noted that the defendant did not interfere with any reasonable belief on the part of the victim that his belongings were secure in the trunk. (*Id.* at p. 917.) While here the owner of the Chevy truck testified that the back window was “accessible,” we do not view that as dispositive.⁵ (See *In re James B.* (2003) 109 Cal.App.4th 862, 867, 870 [holding evidence sufficient to convict minor of violating Penal Code section 459 where window of vehicle was partially open and explaining victim’s state of mind regarding the security of his phone was not at issue].) The question is whether the doors were locked within the meaning of Penal Code section 459. Defendant’s citation to *Allen* is unpersuasive on this point.

⁴ “[T]he trunk is considered a separate part of the vehicle and illegal entries therein will result in an auto burglary.” (*Allen, supra*, 86 Cal.App.4th at p. 914.)

⁵ The owner also testified that she made sure to lock both doors “to keep honest people honest.”

Defendant argues that where a large window is left accessible to invasion, some type of forced entry is required. For this proposition, he cites *People v. Woods* (1980) 112 Cal.App.3d 226 (*Woods*). *Woods* held that where the entry occurs through a window deliberately left open,⁶ some evidence of forced entry is required. (*Id.* at p. 230.) Here, there was no evidence the window was left open deliberately or otherwise. Rather, the window *could be* opened. *Woods* also distinguished *Malcolm* and explained that it was “not faced with justifiable reasons that prevented total closure, such as leaving a crack open for air circulation or broken window latch.” (*Id.* at p. 230, fn. 2.) *Woods* does not apply to the present situation. Defendant has failed to demonstrate that the evidence was insufficient to support his conviction for burglary in count six.

⁶ The window was deliberately left open five and one-half inches as part of a decoy operation. (*Woods, supra*, 112 Cal.App.3d at p. 228.)

III. DISPOSITION

The conviction for unlawful taking or driving (count fifteen, case No. 62130864A) is reversed and the sentence is vacated in its entirety. In all other respects, the judgment is affirmed. The matter is remanded to the trial court, where the People must file an election within 30 days of the issuance of our remittitur either to retry defendant for felony unlawful taking or driving, or to accept a reduction of this count to a misdemeanor, after which the trial court may resentence defendant accordingly.

/S/

RENNER, J.

We concur:

/S/

DUARTE, Acting P. J.

/S/

HOCH, J.